INDEX

	Page
INTRODUCTION	1
QUESTIONS ANSWERED.	3
Formal action of School Board on freedom of choice and proximity as assignment and transfer criteria.	3
Notice to Negro community as to mechanics of assignment and transfer.	4
A solution to overcrowding.	5
Present administrative problems.	5
Start toward desegregation in 1961 rather than in 1954.	6
Zone lines *vel non*.	7
RESOLUTION OF THE ATLANTA BOARD OF EDUCATION.	8
AFFIDAVIT OF THE ATLANTA SUPERINTENDENT OF SCHOOLS.	12

IN THE

Supreme Court of the United States

October Term, 1963

No. 623

FRED S. CALHOUN, *et al.*,

Petitioners,

—v.—

A. C. LATIMER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

MEMORANDUM OF FACTS FILED BY RESPONDENTS PURSUANT TO DIRECTION OF THE COURT

INTRODUCTION.

The confusion and apparent conflict between the record and the oral argument in this case came about by reason of the fact that the case was argued on a record which was then two years old. In the intervening period the actual situation in Atlanta, as respects both policies and practices, had drastically changed, particularly as a result of the decision of the Circuit Court and its implementation by the Atlanta School Board. These changes which did not appear in the record then came out in

argument and in response to questions from the Court. Hence the confusion. If this circumstance has inconvenienced the Court or embarrassed opposing counsel, we respectfully ask the forgiveness of both. If we have departed from the record, it was unavoidable. The reasons for this were pointed out in our brief in opposition. There we said (p. 9):

> "The most important changes in the plan, however, are those that have taken place as a result of the opinion of Judge Bell, or are planned for September, 1964. These are not in the record, of course. We are dealing with a record made in the first days of desegregation, yet the Court is asked to assess the degree of progress toward a goal made over a period of time. We do not see how that can fairly be done unless we, as attorneys and spokesmen for the school board, may make reference to things that have occurred after the making of the formal record."

In short, what we were attempting to do was to argue the case not on the basis of what the Atlanta situation *was* but what it *is*, based on changes which we conceived to be implicit in the lower court's opinion.

For the convenience of the Court we have arranged the material in this response in question and answer form, the questions being intended in each case to summarize those asked by the Court. The answers in each case show the record reference or the authority on which they are based. In order that there be no question as to the present policies of the Atlanta school authorities, we also include a confirming resolution of the Atlanta Board

of Education and an affidavit from the Superintendent of Schools.

QUESTIONS ANSWERED.

QUESTION (by Chief Justice Warren)

Where in the record or in the briefs does it appear that the Atlanta Board of Education has by formal action adopted a present policy of making initial assignments or granting transfers on the basis of freedom of choice or proximity?

ANSWER:

At the time of oral argument there had been no such formal resolution. This was admitted in response to a direct question by the Chief Justice. It had been publicly stated, however, that under the decision of the Circuit Court the only criteria left in the Atlanta plan were freedom of choice, availability of facilities, proximity to schools, and grade-a-year. (See Affidavit of Superintendent Letson, infra, p. 13.) That such was the situation was also indicated in the briefs. (See Brief for Respondents, pp. 14-15; see Brief for State of Georgia as Amicus Curiae, p. 9.) Availability of facilities as a criterion was recited in the preamble to the original Atlanta plan (R. 11). Availability of facilities is one of the "other relevant matters" (R. 12) which per force are a part of any school assignment and transfer plan. Choice was one of the criteria contained in the original plan (R. 13). All transfers heretofore granted under the Atlanta plan were based upon choice. (Affidavit of Superintendent Letson, infra, p. 14.) Choice was not one of the criteria which were abandoned. (Brief in Opposition, pp. 8-9.) Proximity was not one of the criteria expressly mentioned in the original plan but was recognized

by the District Court, by the respondents, and by petitioners to be a relevant consideration in the assignment and transfer of pupils (R. 212). Atlanta has now adopted a formal policy of applying these criteria in connection with assignments and transfers. (See Resolution of the Atlanta Board of Education, infra, pp. 8-12.)

QUESTION (by Chief Justice Warren):

Has the Negro community been apprised of the mechanics to be followed in applying for initial assignments to the eighth grade and for transfers in the higher grades?

ANSWER:

This question was asked in a context which leads us to believe that what the Chief Justice wanted to know was whether or not the Negro community had been advised as to the plans of the school board relating to assignments and transfers in September, 1964. In response we can only say that there had been a public announcement following the decision of the Circuit Court as to what was left of the Atlanta plan. (See affidavit of Superintendent Letson, infra, p. 13.) The decision of the Circuit Court was widely publicized and was construed by the school board as eliminating all criteria except freedom of choice, availability of facilities, and proximity of schools. (See Affidavit of Superintendent Letson, infra, p. 13.) These were the same criteria urged before the Court on oral argument. For each of the previous years the Negro community had been apprised of how to take advantage of the transfer privilege (R. 63-65, 71). The procedure was printed and made available to the public. (R. 64). In previous years the official action of the Board of Education was made public (R. 64), it was discussed

between the Superintendent and school principals (R. 64-65, 71), and teachers (R. 65), and was discussed over the educational television system (R. 65). It was given wide publicity by newspapers, radio and television (R. 64). It was discussed at Parent-Teacher Association meetings (R. 71). The Superintendent was of the opinion that there was no lack of understanding as to how to apply for transfers (R. 63-64, 71).

QUESTION (by Chief Justice Warren):

When and how will Atlanta solve the present situation with respect to overcrowding whereby some schools are crowded to several times their capacity while others are only half full?

ANSWER:

The respondents freely admit the existence of this situation and concede that the Negro school population suffers more as a result than do the whites, although there is overcrowding with respect to both (R. 105). Overcrowding, however, is not so much a racial problem as a population problem. The enrollment in Atlanta schools has been constantly increasing (R. 101). This increase has consisted almost entirely of Negro children (R. 101, 105). No plan of desegregation, however comprehensive or however fairly administered, can completely solve the problem of overcrowding. Admittedly, desegregation will help and is helping this situation, but the ultimate solution can lie only in additional construction.

QUESTION (by Mr. Justice Stewart):

Does Atlanta *presently* have any administrative prob-

lems which would militate against a more speedy transition toward complete desegregation?

ANSWER:

Since this question is addressed to the situation *presently* existing, it of course can only be answered by going outside the record. The administrative problems which lead to a staggered plan of desegregation were recited in the preamble to the original plan (R. 10-12). Since the existence of these problems was not controverted, the District Court took them as true (R. 19). With respect to the present situation, we can only say that the same problems, including the size of the school system, rapid growth of the community, and shifting populations, continue to exist.

QUESTION (by Mr. Justice Goldberg):

Why did Atlanta not voluntarily start toward desegregation in 1954, and should it be rewarded because it waited to make a start until after a court order which became effective in 1961?

ANSWER:

The answer to these questions must necessarily be more practical than legal. The resistance of the Georgia Legislature, which threatened to cut off funds, the danger of schools being closed, and the successful efforts of the Atlanta community to overcome these obstacles have been stated and reiterated both in the record and in the briefs. (See: Order of District Court of December 30, 1959, R. 29; Order of the District Court of March 9, 1960, R. 43-46; Order of the District Court of September 8, 1960, R. 48-53; Order of the District Court of June

16, 1959, R. 165; Brief in Opposition to Petition for Certiorari, pp. 4, 6; Brief for Respondents, pp. 2, 3; Brief for the State of Georgia as Amicus Curiae, pp. 2, 3.)

QUESTION:

Does Atlanta now have or has it ever had inflexible attendance zones for each school? (This question was raised by several Justices but was perhaps put in best perspective by Mr. Justice White, who asked the precise question whether the District Court made any finding as to the use of attendance lines.)

ANSWER:

The District Court found as follows (R. 158):

> "Neither does the evidence show that defendants are maintaining a 'dual system of school attendance area lines.' Proximity to the schools in question is a factor considered by the defendant Board. It is not shown that defendants are acting arbitrarily in connection with the assignment of pupils in relation to their distance from the school. It does appear that area lines (where such exist) are sometimes changed for the sole purpose of relieving overcrowded conditions in the schools."

On the question of lines the Court of Appeals also found (R. 234) that:

> "He [the School Superintendent] testified that there were no attendance areas or zone lines established by the board, but that lines are sometimes drawn administratively between schools in an attempt to equalize class loads. There was no evidence

before the court that they were based on race. The Atlanta system is divided into five sub-areas with an assistant superintendent in charge of each area. One sub-area has only Negro schools in it, but there is no evidence of white children living in it, or that it resulted from gerrymandering."

In his dissenting opinion Judge Rives challenges these statements (R. 250, Footnote 4). With all deference to Judge Rives and to the District Court, the statement made in the majority opinion in the Circuit Court more correctly states the facts.[1] For administrative purposes, as distinguished from attendance, the school board has divided the City of Atlanta into five administrative areas, each under an area superintendent (R. 234). Atlanta has no "official attendance lines. There are administrative lines drawn by individual schools on occasion to equalize the load in various schools." (R. 61.) "There are no official lines in this city." (R. 98, 99.) (See also R. 104-105.)

RESOLUTION OF THE ATLANTA BOARD OF EDUCATION.

A regularly called meeting of the Atlanta Board of Education was held at the administrative offices of the Board on April 8, 1964. All members of the Board were present.

A report was received from Mr. A. C. Latimer, Mr. Newell Edenfield, and Mr. J. Lee Perry, the attorneys

---

[1] A reading of the testimony quoted in footnote 4 of Judge Rives' dissent (R. 250) will reveal that the line of inquiry was with respect to elementary schools which, of course, have not been reached by the plan at this date. (R. 61-62).

who appeared for the Board in the case of Calhoun v. Latimer before the Supreme Court of the United States.

It was reported by the attorneys that at the time of argument the Court was somewhat confused as to exactly what issues were presented for decision, inasmuch as the record in the case was originally made during the 1961-62 school year, and particularly because neither in the record nor elsewhere did it appear what policy was to be followed by the Board in making assignments and granting transfers under the plan of desegregation for the school year 1964-65.

By reason of the foregoing and in the light of certain questions asked by the Justices during argument, the attorneys were requested by the Court to furnish to the Court such documents, minutes or resolutions, or other actions of the Board as would indicate the exact position of the Board on these questions. The attorneys thereupon requested the Board to adopt such a resolution for the benefit of the Court stating unequivocally the present policy of the Board and the factors to be considered by it in making initial assignment of pupils and in permitting transfers for the school year 1964-65.

Upon motion made and seconded, the following resolution was adopted by a unanimous vote:

"BE IT RESOLVED: That for the school year beginning August 24, 1964, all pupils entering the eighth grade from elementary schools be assigned among the various high schools without regard to race, after consideration of the following factors:

1. Choice of the pupil or his parents;

2. Availability of facilities; and

3. Proximity of the school to place of residence.

"BE IT FURTHER RESOLVED: That among those seeking to attend a particular school, where facilities are not available for all, priority shall be based on proximity, except that for justifiable educational reasons and in hardship cases other factors not related to race may be applied. Administrative assignments or reassignments may be made in cases of overcrowding, in hardship cases, and for disciplinary reasons. When such administrative assignments are made they shall be based on relative proximity and available facilities, giving consideration to pupil choice where possible.

"BE IT FURTHER RESOLVED: That in those grades already reached by the Atlanta plan of desegregation (ninth, tenth, eleventh and twelfth grades), transfers be freely granted according to the criteria hereinbefore provided, without formal application, other than the usual pre-registration required of all students.

"BE IT FURTHER RESOLVED: That where a student has exercised his choice of schools, either by initial assignment to the eighth grade or by transfer, as herein provided, further and additional transfers will be permitted only in hardship cases or for valid educational reasons unrelated to race.

"BE IT FURTHER RESOLVED: That a certified copy of this resolution be furnished to the attorneys for transmission to the Supreme Court of the United States in accordance with its direction."

CERTIFICATE

I, Louise Simpson, Secretary of the Atlanta Board of Education, do certify that the within and foregoing constitutes a true and correct transcript of a resolution adopted by the Atlanta Board of Education in regular called session held on the 8th day of April, 1964.

LOUISE SIMPSON,
Secretary.

(SEAL)

AFFIDAVIT OF THE ATLANTA SUPERINTENDENT OF SCHOOLS.

GEORGIA,
FULTON COUNTY

Personally before the undersigned officer authorized to administer oaths appeared JOHN W. LETSON, who, being duly sworn, deposes and says that he is Superintendent of Schools in the City of Atlanta, Georgia, and that he makes this affidavit to be furnished to the Supreme Court of the United States for the purpose of clarifying and eliminating any uncertainty as to what are the present policies of the Atlanta School Board with respect to the assignment and transfer of pupils pursuant to the plan of desegregation originally adopted pursuant to court order in 1959.

Affiant deposes and says that in the opinion of the Court of Appeals for the Fifth Circuit (on petition for rehearing), the Court held:

> "The corrective action necessary in light of the deficiencies will entail the application of the plan in an even handed manner without regard to race to all assignments of pupils new to a school for admission in a desegregated grade in that school; and to all transfers whether formal, informal or otherwise. Personality interviews to determine probable success or failure in the schools to which transfer and assignment is sought may not be utilized where such a practice relates only to Negro pupils as was the case. No standard requiring that a transferee score a grade on scholastic ability and achievement tests equal to the average of the class in the school to which transfer is sought may be utilized, nor may

any scholastic requirement whatever be used where applied only to Negro students seeking transfer and assignment as was the case in Atlanta in the administration of the plan approved by the District Court. The opinion is modified to make it clear that this corrective action must apply to transfers and assignments for the 1963-64 school term to the extent, if any, that the practices giving rise to the deficiencies may have been continued in use."

Affiant further says that upon the rendition of the judgment quoted, it was publicly stated by him, on behalf of the Atlanta Board of Education, that under the decision initial assignments could be made and transfers determined only on the basis of freedom of choice, available facilities, proximity, or other valid educational reasons, not related to race.

Affiant shows that pursuant to the conclusions stated, and in what they conceived to be compliance therewith, the Board caused all previous applications for transfer to be reconsidered and further caused each of said transfers which had been denied to be granted, provided only that the school to which transfer was sought was nearer to the place of residence of the student than the school then attended.

Affiant shows that the foregoing conclusions of necessity would not appear on the record in the Supreme Court of the United States because they represented policies which were and could only have been adopted subsequent to the decision of the Circuit Court on August 16, 1963.

Affiant says further that said policies were publicly reported at the time of the reconsideration of transfer ap-

plications following receipt of the Circuit Court opinion. Administrative regulations were not formulated and distributed because it has always been the policy of the Board since the adoption of the original plan to announce administrative regulations for the assignment and transfer of pupils by a regulation promulgated in the spring of each school year to be effective during the following school year.

With respect to "freedom of choice" as distinguished from "proximity" in making assignments and transfers, affiant shows that such a factor was among those contained in the original plan, that all transfers heretofore granted pursuant to the plan were initiated pursuant to choice, and that for administrative reasons wholly unrelated to race, Atlanta prefers to continue to give recognition to choice, as well as proximity, in making assignments and transfers in the future.

JOHN W. LETSON

Sworn to and subscribed before me this 10th day of April, 1964.

FANNIE R. KNIGHT
Notary Public
Notary Public, Georgia, State at Large.
(SEAL). My Commission Expires Jan. 26, 1966.

Respectfully submitted,

A. C. LATIMER, Attorney for
Atlanta Board of Education

NEWELL EDENFIELD,
Of Counsel